

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John and Helen McGregor, on behalf of
themselves and all others similarly situated,

Court File No. 09cv1136/ADM/JJK

Class Action

Plaintiffs,

v.

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Uponor, Inc., successor to Uponor North
America, Inc., and Radiant Technology, Inc.,

Defendants.

INTRODUCTION

Defendants have admitted in another federal court that the brass plumbing fittings at issue here were “defective,” “not merchantable,” and “unreasonably dangerous.” Defendants stopped selling these fittings several years ago after the fittings began failing prematurely in homes and businesses. Far different from their advertising pitch when selling the fittings, Defendants now criticize the fittings’ design as being more susceptible to stress corrosion cracking and dezincification – the precise mode of the failure of Plaintiffs’ plumbing fittings.

After selling millions of these fittings, Uponor, Inc. and its wholly owned subsidiary Radiant Technology, Inc. (“RTI”) (collectively “Uponor”) first publicly stated that the chemical composition of the fittings did not comply with the governing ASTM standard. Uponor also confirmed that poor manufacturing practices had caused cracks in the fittings before the fittings were even used. After receiving a number of complaints of failures from large home builders, Uponor paid for the removal of all fittings from at least 700 homes.

Uponor has not answered the Complaint or filed a responsive pleading. It instead filed this motion to dismiss. Although Plaintiffs believed their initial Complaint was more than

adequate, they have utilized their right under Rule 15(a) to amend the complaint as of right. Plaintiffs have now served and filed an Amended Complaint. Such an amendment makes this motion to dismiss moot.

ARGUMENT

Under Rule 15 (a) of the Federal Rules of Civil Procedure, a party may amend its complaint once as of right before a responsive pleading is served. Fed. R. Civ. P. 15(a). A motion to dismiss, such as the one brought here, is not considered a responsive pleading for purposes of Rule 15. *See, e.g., Mohammed v. Frazier*, 2008 WL 360778 at *1 (D. Minn. 2008) (Kyle, J.) (quoting *Winfrey v. Brewer*, 570 F. 2d 761, 764 n.4 (8th Cir. 1978) (“A motion to dismiss is not a ‘responsive pleading’ for purposes of Rule 15.”)); see also Fed. R. Civ. P. 7 (a), (b) (noting differences between motions and pleadings).

An amended complaint, or even a motion to amend, renders moot a motion-to-dismiss filed on a prior complaint. *See, e.g., Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002) (citing *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F.Supp. 232, 239-40 (D.Del. 1992) (holding that the plaintiff’s filing of an amended complaint rendered the defendants’ motion to dismiss the original complaint moot)).

Plaintiffs have amended their original complaint thereby rendering Uponor’s motion to dismiss the first complaint moot. Uponor’s motion should be denied as moot.

CONCLUSION

Although the original Complaint in this matter was well-drafted and adequately stated the causes of action asserted against Uponor, Plaintiffs have now amended that complaint as of right. As a result, Uponor’s motion to dismiss is moot.

Dated this 7th day of August, 2009.

LARSON • KING, LLP

By s/Shawn M. Raiter
Shawn M. Raiter (240424)
T. Joseph Snodgrass (231071)
2800 Wells Fargo Place
30 East 7th Street
St. Paul, MN 55101
Telephone: (651)312-6500
Email: sraiter@larsonking.com

Charles J. LaDuca
CUNEO GILBERT & LADUCA, LLP
507 C Street, N.E.
Washington, DC 20002
Telephone: (202) 789-3960
Email: CharlesL@cuneolaw.com

Robert K. Shelquist #21310X
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401-2197
Telephone: (612) 339-6900
Email: rshelquist@locklaw.com

David L. Black
Perkins Coie LLP
1899 Wynkoop Street, Suite 700
Denver, CO 80202-1043
Telephone: (303) 291-2309
Email: DBlack@perkinscoie.com

Michael A. McShane
Audet & Partners, LLP
221 Main Street, Suite 1460
San Francisco, CA 94105-1906
Telephone: (415) 568-2555
Email: MMcShane@audetlaw.com

1262753